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Supreme Court of the United States.

No. 528.—October Term, 1903.

Walter N. Dimmick, Appellant,
vs.
John W. Tompkins, Warden of the State Prison of the State of California, at San Quentin.

Appeal from the Circuit Court of the United States for the Northern District of California.

[May 31, 1904.]

Dimmick, the appellant, presented his petition for a writ of *habeas corpus* to the Circuit Court of the United States, Northern District of California. The petition was denied and an appeal taken to this court from the order denying the application. The appellant alleged in his petition for the writ that he was unlawfully imprisoned in the State prison of the State of California; that the imprisonment was illegal and in contravention of the Constitution of the United States, Article Five of the amendments to the same; that on October 16, 1901, he was sentenced to imprisonment in the State prison by the District Court of the United States in and for the Northern District of California for the period of two years, to date from the 16th day of October, 1901; that he had been imprisoned, under the judgment, in the State prison ever since April 13, 1903, and that prior thereto, and from the date of the judgment to April 13, 1903, he was imprisoned, under said judgment, in the county jail of the county of Alameda by the order of the District Court.

The appellant also alleged that, notwithstanding the foregoing facts, the warden refused to discharge or release him from imprisonment, although the term of said imprisonment expired, according to its terms, on October 16, 1903. The appellant then set forth in the petition a copy of the record of the proceedings of the District Court of the United States, which showed that he was convicted in the District Court on the 16th of October, 1901, of making and presenting a false claim, as charged in the first count of the indictment, and of using a portion of the public moneys of the United States for a purpose not prescribed by law, as charged in the fourth count; and that he was sentenced "to be imprisoned at hard labor for the term two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California."

The record was signed by the district judge who held the court.

The petition also set forth a copy of the indictment under which the trial was had. It was founded upon sections 5438 and 5497 of the United States Revised Statutes, and charged in substance the presentation to the cashier of the mint at San Francisco of a certain false, fictitious and fraudulent claim against the United States and known to be fraudulent by the defendant at the time he presented it; also, with having unlawfully used a portion of the public moneys for a purpose not prescribed by law. The appellant averred that neither the first nor the fourth count charged any crime or publice offence against the United States nor the violation of any law of the United States, and that both counts were fatally defective. The appellant also averred that the judgment of the court, in as far as it required his imprisonment in the State prison, was void, because the United States District Court sentenced him for one year, and no more, upon each of the two counts of the indictment referred to in the judgment, and did not sentence him to imprisonment for a period of more than one year upon each of said counts, and that a sentence to the State prison for a period of not more than one year violated the statutes of the United States.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The appeal directly to this court from the decision of the Circuit Court denying the writ of *habeas corpus* was proper under the averments contained in the petition, that the imprisonment of the appellant was in violation of the Federal Constitution. (*Craemer* v. *Washington State*, 168 U. S. 124, 127.)

The appellant contends that, as his sentence was imprisonment "at hard labor for the term of two years from October 16, 1901," his term of imprisonment under that sentence necessarily expired by its own limitation on October 16, 1903, even without any deduction for credits earned by good behavior.

If the appellant had been at once transported to the State prison under the sentence imposed upon him after his conviction, it is of course plain that two years from the time of his sentence (if he remained there in the meantime) would be the extent of his legal detention. In fact, he was not taken to the State prison until April 13, 1903, but he avers that he had been previously and from October 16, 1901, the date of the judgment, to April 13, 1903, imprisoned under said judgment in the county jail of the county of Alameda, by the order of said District Court. The sentence upon the verdict of guilty is given in the record, which is made a part of the petition, and that record shows that the appellant was "sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be

executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California."

The imprisonment of the appellant in the county jail could not, therefore, have been under the judgment which prescribes imprisonment in the State prison. But such detention may have been owing to his efforts to obtain a review and reversal of the judgment and in the meantime a supersedeas thereon, so as to prevent his transportation to the State prison, and in that case such detention should not be counted as any part of the time of imprisonment in the State prison. In that event his imprisonment in the State prison, under the judgment, should be counted from the time it actually commenced, notwithstanding the statement of the sentence that it should be for two years from October 16, 1901. The time of commencement was postponed by his own action, and he cannot take advantage of it and thus shorten the term of his imprisonment *at hard labor in the State prison.*

Upon this writ the question to be examined is one of jurisdiction, and in this case it is whether the warden of the prison has the legal right to continue the imprisonment under the sentence and warrant of commitment notwithstanding the expiration of two years from the time of sentence. If, as we have said, the detention in the jail was the result of his own action, and his imprisonment at hard labor in the State prison did not, for that reason, commence until April 13, 1903, then the legal term of his imprisonment in the State prison has not expired and he is properly detained. As it was incumbent upon the appellant to show his continued imprisonment was illegal, (there being no presumption that it was,) the duty and the burden rested upon him to aver, and, if the averment were traversed, to prove that his detention in jail had not been by reason of the fact suggested. This he has not done. There is no such averment in the petition for the writ and there is no proof of such fact to be found. *Non constat*, that he was not detained for the very reason already stated. This is fatal to the appellant, so far as this point is concerned.

As might be surmised, there was ample reason for not making the allegation. It would not have been true.

It appears from our own records that a petition for a certiorari was filed in this court by appellant February 2, 1903, asking for a review of the above-mentioned judgment, and in that petition it is stated that the appellant had taken proceedings to have the judgment reviewed by the Circuit Court of Appeals, and had obtained a supersedeas thereon, and after the judgment had been affirmed by that court and on January 13, 1903, the District Court ordered the execution of the judgment thus affirmed to be stayed for the period of thirty days from that date to enable the appellant to make application to this court for a writ of certiorari,

which application was made, and denied by this court March 2, 1903. (189 U. S. 509.) In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler* v. *Eaton*, (141 U. S. 240, 242;) *Craemer* v. *Washington State*, (168 Id. 124, 129;) *Bienville Water Supply Company* v. *Mobile*, (186 Id. 212, 217.)

That the party seeking to review a judgment of imprisonment in a State prison cannot take advantage of his own action in so doing as to thereby shorten the term of imprisonment in the State prison is, as we think, plain. To hold otherwise would be inconsistent with the general principle that a person shall not be permitted to take advantage of any act of another which was committed upon his own request or was caused by his own conduct. See *McElvanie* v. *Brush*, (142 U. S. 155, 159.) The question has arisen in some of the State courts and has been so decided. See *Ex parte Duckett*, (15 S. C. 210,) decided in 1881; *Ex parte Espalla*, (109 Ala. 92,) decided in 1896. In such cases the provision of the sentence that the imprisonment is to commence on or to continue from a certain day is rendered impossible of performance by the act of the defendant, and he will not be permitted to obtain an advantage in such manner. The appellant cites no case which questions this principle. Those cited by him have, generally, reference to the construction to be given the language of the sentence as to the time of its commencement. They do not deny the rule as to the action of defendant in preventing its execution.

Johnson v. *The People*, (83 Ill. 431,) is not in point. The case arose on error brought by the defendant after conviction in the court below. He was convicted under several counts of an indictment for selling intoxicating liquors and the sentence fixed a day and hour when the imprisonment should commence under each count. This was held to be error, as the sentence to imprisonment should have been for a specified number of days under each count upon which conviction is had, and the imprisonment under each succeeding count would begin when it ended under the preceding one, without fixing the day or hour of any. It appeared in that case that a supersedeas had been granted, and that it had become impossible that the judgment of imprisonment could be carried into effect, as the time fixed by the court had elapsed. The sentence was held to be an erroneous one, and the judgment was reversed and the case remanded with directions that the court should enter a proper judgment on the verdict.

In *Dolan's case*, (101 Mass. 219,) the prisoner, after imprisonment, had escaped before the term of the sentence had expired, and having been retaken claimed his discharge at the expiration of the time that he would have been entitled to it if he had not escaped. Neither the date of its commencement nor of its expiration was fixed by the terms of the sentence.

His application was denied, and it was held that the defendant must be imprisoned for a time which corresponded with his original sentence, and that the expiration of the time without imprisonment was in no sense an execution of the sentence.

Also, in *State* v. *Cockerham*, (2 Ired. Law, 24 N. C. 204,) it was held that the time at which the sentence should be carried into execution forms no part of the judgment. The judgment is the penalty of the law as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. So here, in the case before us, the material part of the sentence is imprisonment for two years in the State prison, and that sentence is not satisfied by a detention in the county jail for a portion of the two years by reason of the proceedings of appellant to review the judgment under which the sentence was given.

As to the time of the commencement of the sentence, *State* v. *Gaskins*, (65 N. C. 320,) is based upon a statute, which declared that the term of imprisonment "shall begin to run upon and shall include the day of conviction." The question did not arise by reason of the act of the defendant in taking proceedings to review the judgment.

Woodward v. *Murdock*, (124 Ind. 439,) simply holds that the period the prisoner is out of jail under parole is part of the time for which he was sentenced, and when the original time expires he is entitled to his discharge just the same as if he had been in prison the whole time. It was held that he was constructively in prison, although in fact conditionally at large under his parole, and that while thus on parole his sentence ran on.

The sentence given in this case could only have been satisfied by imprisonment in the State prison at San Quentin for the period of time mentioned in the sentence. This is not the case of an arbitrary detention in jail, without excuse or justification, after sentence to imprisonment in a State prison. If in such case the defendant were helpless, the question might arise whether the time of such improper detention in jail should not be counted, as to that extent, a satisfaction of the sentence.

It is also objected that the sentence is void because it directs imprisonment in the State prison for a period that does not exceed one year on each count of the indictment, and *In re Mills*, (135 U. S. 263–268,) is cited to sustain the proposition.

In that case the prisoner was sentenced upon two indictments to imprisonment in the penitentiary, in one case for a year and in the other for six months, and it was held that the imprisonment was in violation of the statutes of the United States. See R. S. 5541, 5546, 5547.

In the case at bar the sentence was for two years upon one indictment, and there is no statement in the record that there was a separate sentence each for one year upon the first and fourth counts of the indictment. In

this we think there was no violation of the statute, and the sentence was therefore proper and legal. The appellant may have been sentenced upon one count only for two years. Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases. But this record shows a sentence for two years to the State prison, and there is nothing to show the court was without jurisdiction to impose such sentence for the crime of which the defendant was convicted.

It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offence under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to adjudge that the indictment did not properly charge an offence in both the first and fourth counts. See *Dimmick* v. *United States*, (116 Fed. 825,) involving this indictment, where it is set forth. It is not, however, necessary in this case to decide the point, for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offence sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offence, the decision was within the jurisdiction of the court to make, and could not be re-examined on *habeas corpus*. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on *habeas corpus*. (*Ex parte Parks*, 93 U. S. 18; *In re Coy*, 137 Id. 31; *In re Eckert*, 166 Id. 481.) In the last case it was stated that (page 483)—

"The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offence against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offences within which is embraced the crime sought to be set forth in the indictment, is possessed of authority to determine the sufficiency of an indictment, and that, in adjudging it to be valid and sufficient, acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime."

The order refusing the writ was right, and is *Affirmed.*

END OF CASE